Ho Lai Ying (trading as KH Trading) & Anor v Cempaka Finance Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–03–151 OF 2000
ALAUDDIN, MOHD GHAZALI JJCA AND ABDUL MALIK ISHAK J
22 DECEMBER 2003

Banking — Banker and customer — Claim for amount outstanding under banking facility — Production of certificate of indebtedness by bank — Whether mere production of certificate of indebtedness sufficient to indebtedness

Civil Procedure — Summary judgment — Appeal — Production of certificate of indebtedness — Whether sufficient to establish case against defendants

The respondent granted a fixed loan facility to the first appellant. The second appellant was the guarantor. The first appellant defaulted in the repayment of the facility and consequently, the respondent instituted legal proceedings against the appellants. On 17 August 1999, the senior assistant registrar gave summary judgment against the defendants under O 14 of the Rules of the High Court 1980. The documents exhibited in the respondent's affidavit in support of the summary judgment application were the loan agreement, the guarantee and the certificate of indebtedness. The appellants challenged the correctness of the certificate of indebtedness. The appellants' appeal to the judge in chambers was dismissed, hence the instant appeal.

Held, allowing the appeal:

(1) The respondent did not sufficiently establish its case against the appellants. The certificate of indebtedness would only be conclusive if the respondent had illustrated how the sum mentioned therein was arrived at. The mere production of a certificate of indebtedness was insufficient to establish that the said sum was due and owing. The court cannot assume that the amount shown therein was correct (see para 13).

(2) The conclusiveness of the certificate of indebtedness was binding only on the parties. The court would still have to determine whether sufficient evidence had been adduced to prove the quantum and correctness of the amount claimed by the respondent. The burden was on the respondent to establish that the sum stated in the certificate of indebtedness was owing. In the instant case, the evidence adduced by the respondent was lacking in certain particulars which, if existed, would entitle the respondent to enter final judgment against the appellants (see paras 14–15).

[**Bahasa Malaysia summary**

Responden telah memberikan satu kemudahan pinjaman tetap kepada perayu pertama. Perayu kedua adalah penjamin. Perayu pertama telah gagal dalam pembayaran balik kemudahan tersebut dan berikutan itu, responden telah memulakan prosiding undang-undang terhadap perayu-perayu. Pada 17 Ogos 1999, penolong kanan pendaftar telah memberikan penghakiman terus

terhadap defendan-defendan (perayu-perayu) di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Dokumen-dokumen yang diekshibitkan dalam afidavit sokongan kepada permohonan penghakiman terus responden adalah perjanjian pinjaman, gerenti dan sijil keberhutangan. Perayu-perayu telah mencabar kesahihan sijil keberhutangan tersebut. Rayuan perayu-perayu kepada hakim dalam kamar telah ditolak, justeru itu rayuan semasa dibuat.

Diputuskan, membenarkan rayuan tersebut:

(1) Responden tidak dengan secukupnya membuktikan kesnya terhadap perayu-perayu. Sijil keberhutangan akan hanya menjadi konklusif jika responden menggambarkan bagaimana jumlah yang dinyatakan di dalamnya wujud. Pengemukaannya sahaja suatu sijil keberhutangan tidak mencukupi untuk membuktikan bahawa jumlah tersebut adalah yang perlu dijelaskan dan terhutang. Mahkamah tidak boleh menganggap bahawa jumlah yang ditunjukkan adalah betul (lihat perenggan 13).

(2) Sijil keberhutangan yang tidak boleh dipertikaikan hanya terikat ke atas pihak-pihak tersebut. Mahkamah masih perlu mempertimbangkan sama ada keterangan yang mencukupi telah dikemukakan untuk membuktikan kuantum dan kesahihan jumlah yang dituntut oleh responden. Beban terletak atas responden untuk membuktikan bahawa jumlah yang dinyatakan dalam sijil keberhutangan tersebut perlu dijelaskan. Dalam kes semasa, beberapa butiran tertentu tidak mencukupi dalam keterangan yang dikemukakan oleh responden yang mana, jika ada, akan memberi hak kepada responden untuk memasukkan penghakiman muktamad terhadap perayu-perayu (lihat perenggan-perenggan 14–15).]

Notes

For cases on appeals against summary judgments, see 1 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5726–5775.
For cases on claims for amount outstanding under banking facilities, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1586.
For cases on summary judgments, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.6-048]–[10.6-057].

Cases referred to

Bank of Commerce (M) Bhd v Tan Boon Soon @ Tan Po Lo (t/a Messrs Sykt Soon Tatt Trading) & Anor [1995] 1 AMR 156 (refd)
Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (refd)
Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd [1972] 1 MLJ 168 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Legislation referred to

Evidence Act 1950 s 101
Rules of the High Court 1980 O 14

Appeal from: Civil Suit No D3–22–1701 of 1998 (High Court, Kuala Lumpur)

SL Tan (SL Tan & Assoc) for the appellants.
Nadrah bte Mohamed (Shatar Tan & Chee) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

[1] On the application of the first appellant, the respondent, a finance company, gave a fixed loan facility of RM1,500,000.00 to the former vide loan agreement dated 17 July 1996 ('the said agreement'). The first appellant had agreed to repay the said facility with interest at the rate of 2%pa above the respondent's base lending rate, which as at 1 December 1997 was 12.30%pa, with monthly rests by 180 instalments of RM18,003 per month commencing 30 August 1996, ie one month after the loan amount is fully released, subject to the terms and conditions contained in the said agreement. Pursuant to a guarantee agreement also dated 17 July 1996, the second appellant guaranteed to pay the respondent on demand all or any of the first appellant's debts to the respondent under the said agreement. The first appellant defaulted and consequently did not respond to letters of demand issued by the respondent.

[2] On 29 May 1998, the respondent instituted legal proceedings against the appellants and claimed the sum of RM1,554,019.74 due and owing as at 29 November 1997 together with interest accruing thereon commencing 30 November 1997 and an additional interest accruing on the defaulted monthly instalments at the rate of 1%pa calculated on a daily basis from 30November 1997 till the date of full settlement.

[3] On 17 August 1999, the learned senior assistant registrar gave summary judgment against the appellants under O 14 of the Rules of the High Court 1980. The appellants' appeal to the judge in chambers was dismissed. Against that decision, the appellants appealed to this court.

[4] From our perusal of the respondent's affidavit filed in support of their application for summary judgment, we noticed that besides a copy of the said agreement and the guarantee agreement, the only other document exhibited was a certificate of indebtedness (exh P3). Exhibit P3 reads:

DALAM PERKARA GUAMAN SIVIL NO D3–22–1701–1998

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

ANTARA

CEMPAKA FINANCE BERHAD ... PLAINTIF

DAN

1 HO LAI YING

(BERNIAGA ATAS NAMA KH TRADING)

2 KOR TOONG KHOON ... DEFENDAN-DEFENDAN

PERAKUAN

Saya CHOO HONG CHUEN (No K/P: 600901-10-6611) seorang Pengurus Cawangan Kuala Lumpur pihak Plaintif dengan ini memperakui dan mengesahkan Ho Lai Ying (berniaga atas nama KH Trading) dan Kor Toong Khoon, Defendan-defendan yang dinamakan di atas berhutang kepada Plaintif sebanyak RM1,554,019.74 pada setakat 29/11/97 dengan faedah di atas jumlah tersebut mulai 30/11/97 pada kadar 2% setahun di atas Kadar Asas Pinjaman Plaintif (yang pada setakat 1/12/97 adalah 12.30% setahun) pada kadar asas bulanan sehingga penyelesaian sepenuhnya dan faedah tambahan di atas jumlah ansuran yang terakru pada kadar 1% setahun di atas jumlah tersebut yang dikira pada asas harian dari 30/11/97 sehingga penyelesaian sepenuhnya.

Bertarikh pada 19 haribulan APR 1999.

(tt)

CHOO HONG CHEUN

[5] We also noted that the appeal records showed that learned counsel for the appellants challenged the correctness of exh P3. He argued that the respondent failed to produce supporting documents such as the statement of accounts to show the quantum of the sum claimed. He also complained about the additional interest of 1%pa imposed over and above the sum claimed as due and owing.

[6] From our reading, as against the first appellant, exh P3 would seem to have been issued pursuant to cl 27 of the said agreement which reads:

> If and when the Loans shall be withdrawn or revoked and/or the said account or accounts whatsoever in respect thereof shall be closed a statement by the ... Manager ... as to the amount of such balance and the money and liabilities for the time being incurred or due to the Lender by or from the Borrowers(s) shall be accepted by the Borrowers(s) ... as final and conclusive evidence for all purposes whatsoever including for purposes of legal proceedings.

[7] As against the second appellant, exh P3 would seem to have been issued pursuant to cl 7.03 of the guarantee agreement which reads:

> It is hereby agreed that ... a statement of account in writing showing the indebtedness of the Borrower(s) in relation to the subject matter of this Agreement duly certified by an authorized officer of the Lender shall be binding and conclusive against the Guarantor(s) ....

[8] Summary judgment procedure is a procedural device available for prompt and expeditious disposition of an action by a plaintiff without trial when there is no dispute as to fact or law. In *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, the learned judge observed (at p 287):

> The effect of O 14 is to shut the defendant from having his day in the witness box. It is a very special jurisdiction and is only to be invoked in cases where there is no bona fide triable issues.

[9] In *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85, the learned judge said (at pp 86–87):

> … the purpose of O 14 of the Rules of the Supreme Court 1957 is to enable the plaintiff to obtain summary judgment without trial if he can prove his case clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried, final judgment should be allowed.

[10] Thus, a plaintiff would be entitled to obtain summary judgment without trial if he can prove his case clearly which to us would mean the plaintiff has to establish the existence of certain facts and must prove that those facts exist before the court can determine the issue as to whether the defendant has a defence or has raised an issue against the claim which ought to be tried.

[11] In the instant case, in their affidavit in support of the application, as mentioned earlier, the respondent introduced the following documents:

(i) the said agreement (exh P1);

(ii) the guarantee agreement (exh P2); and

(iii) the certificate of indebtedness (exh P3);

(hereafter referred to collectively as 'the said documents').

[12] In their affidavit in opposition, the appellants, as stated earlier, had challenged the correctness of exh P3 and pointed out that the respondent failed to produce supporting documents to show the correctness of the sum claimed.

[13] The sole question before us is whether the respondent had sufficiently established their case against the appellants, namely, that the appellants as at 29 November 1997 owed the respondent the said sum of RM1,554,019.74. We do not think so. Exhibit P3 would only be conclusive evidence if it had been illustrated in the respondent's affidavit in support of their application for summary judgment as to how the sum mentioned therein was arrived at. It is our view that the mere production of exh P3 was insufficient to show that the respondent had clearly established that the said sum was due and owing. The court cannot just assume that the amount shown therein is correct. No documentary evidence such as in the form of monthly statement of accounts and the amount of interest imposed on the monies released were introduced by the respondent. Under the circumstances, we cannot come to the conclusion that the respondent had clearly proven their case. In *Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd* [1972] 1 MLJ 168, Raja Azlan Shah J (as His Majesty then was) said (at p 171):

> It is I think right that an order under RSC Order 14 should be made only if the court thinks it is a plain case and ought not to go for trial. If one simply has a short matter of construction with a few documents, the court on summary judgment should decide what in its judgment is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed.

[14] All the said documents showed is that the said facility was granted to the first appellant with the second appellant as the guarantor. What we were gravely concerned with is whether the evidence introduced up to now is sufficient prima facie to establish the respondent's case. The law on the burden of proof is governed by the provisions found in Chapter VII of Part III of

the Evidence Act 1950. In accordance with s 101 of the Evidence Act 1950, the legal burden of establishing that the said sum stated in exh P3 is owing from the appellants to the respondent lie on the latter. The conclusiveness of exh P3 is binding only upon the parties. The court would still have to determine whether sufficient evidence has been adduced to prove the quantum and correctness of the amount claimed by the respondent. In *Bank of Commerce (M) Berhad v Tan Boon Soon @ Tan Po Lo trading as Messrs Syarikat Soon Tatt Trading & Anor* [1995] 1 AMR 156, T Selventhiranathan JC (as he then was), in dismissing an appeal against the decision of the learned senior assistant registrar in refusing the plaintiff's application for summary judgment to be entered against the second defendant who was the guarantor for certain credit facilities granted to the first defendant, said the failure of the plaintiff 'to disclose how the sum claimed was arrived at or whether any credit was given for amounts paid or realized in accordance with the guarantee so as to enable it to arrive at the ultimate balance after the deduction of all payments made or amounts realized, raised triable issues which merited determination only after a full hearing'. We would fully agree with him.

[15] On the whole, it is our view that the evidence adduced by the respondent for the purpose of this application is lacking in certain particulars which would entitle them to enter final judgment against the appellants. Seeing that the appellants dispute the indebtedness in relation to interest imposed which is an issue which ought to be tried, we allowed the appeal with costs.

Appeal allowed.

Reported by Lim Lee Na